

Conservation (DEC) Concentrated Animal Feeding Operation (CAFO) permit process and explained the factors which the Department considers in determining whether a local law is unreasonably restrictive under AML §305-a, subd.1.

2. Mr. Brower provided the committee with suggestions for a local law that would address the Town's concerns while complying with AML §305-a. Mr. Brower explained that a local law that mirrors DEC's requirements for CAFO permits would not be unreasonably restrictive. The local law could require all CAFOs to submit copies of their permit application and permit to the locality; make permit information available for inspection; and to keep the locality updated on changes in the permit status. To the extent permitted by State and federal law, a local law could adopt the State standard and include an enforcement mechanism including on site inspection and review of the plan as the result of a complaint.
3. On December 11, 2001, Kim Blot, the Director of the Division of Agricultural Protection and Development Services, sent a letter to Norman Snow, Supervisor for the Town of Milo, providing comments on the Town committee's draft Article XIII of the Town Zoning Ordinance for Intensive Livestock Operations. Mr. Blot informed the Town that several provisions of the draft ordinance would adversely impact farm operations within an agricultural district and might be unreasonably restrictive. The provisions of concern included: requirements for site plan review for manure storage facilities; mandated nutrient management plans for smaller livestock farms; manure storage requirements for smaller farms; a prohibition against manure storage facilities within the zoned low density residential and/or commercial districts in the Town; requirements for posting of emergency contact information; excessive setbacks for livestock operation facilities, manure storage and land application of liquid manure; and land application requirements which exceed the State's. Mr. Blot also expressed the Department's willingness to work with the Town to resolve potential conflicts between the proposed local law and the AML and provided options for addressing local concerns without unreasonably restricting farm operations in Yates County Agricultural District Number 1.
4. Mr. Blot informed the Town that the DEC CAFO permit regulates larger livestock farms, provided him with copies of a DEC CAFO Fact Sheet and General Permit package and explained that the DEC's permitting process for CAFOs addresses public health and safety issues related to water pollution. Mr. Blot explained that CAFO farms are required to have a plan prepared according to the NRCS Conservation Practice "Waste Management System No. 312-NY" for the proper management of liquid and solid waste as a condition of the DEC CAFO General Permit. The plan includes other NRCS practice standards needed to address resource concerns, such as "Waste Storage Facility NY313" and "Nutrient Management (Supplement) NY590." The information provided by Mr. Brower during his meeting with the Town's committee, i.e. that a local law which is consistent with the State's CAFO permit would not be viewed as unreasonably restrictive under AML §305-a, was reiterated. Mr. Blot explained that a requirement that a DEC

regulated and permitted activity also obtain a locally administered permit would not appear to be unreasonably restrictive if the local permit requirements did not exceed the State standard, and applications were timely considered and without substantial fees or costs. The Town was requested to respond to the concerns identified by the Department.

5. The Yates County Planning Board ("Planning Board") reviewed the proposed Article XIII of the Milo Town Zoning Ordinance regulating Intensive Livestock Operations (ILOs) pursuant to a referral from the Town required by General Municipal Law §239. The Planning Board provided comments to the Milo Town Board by a memorandum dated February 6, 2002. Among its comments, the Planning Board stated that "The NYS Agricultural Districts Law (Article 25-AA of the NYS Agriculture and Markets Law, the "Ag District Law") restricts local governments in the regulation of farm operations within a County-adopted, State-certified Agricultural District, in this case Yates County Agricultural District #1. The NYS Department of Agriculture and Markets holds that the burden of proof rests with the municipality for showing that local regulation is necessary to protect public health. In the case of the proposed ILO regulations, unfortunately, the Town offers no rationale or proof that a threat to the public health exists or may exist." The Planning Board notes that "There are a number of instances in the proposed ordinance where the language is unclear or vague." The Planning Board also raised questions as to how the Town would ensure that the Zoning Officer has the qualifications to review and inspect the agriculturally technical aspects of the plans, buildings, storage areas and other matters to be regulated under the proposed law. The Planning Board further noted that it had received a copy of the Department's comments on the proposed law and asked the Town how it responds to the questions and concerns raised by the Department.
6. The Department did not receive a response to Mr. Blot's December 11, 2001 letter and does not know whether the Town provided any response to the Planning Board. On April 15, 2002, the Town of Milo passed Article XIII of the Milo Town Zoning Ordinance regulating Intensive Livestock Operations (ILOs). Provisions previously found objectionable by the Department were included in the law as enacted.
7. On April 22, 2002, the Department received a request from the Yates County Farm Bureau and farmers Leroy Hoover and Milton Hurst to review Article XIII for compliance with AML §305-a, subd.1. Mr. Hoover operates a hog farm in Yates County Agricultural District Number 1. Mr. Hoover has 1,000 feeder pigs on his farm and applies the animal waste to approximately 108 tillable acres of cropland according to a nutrient management plan which was developed in accordance with the "NRCS Conservation Practice Standard No. 312-NY". According to the DEC, Mr. Hoover is not required to obtain a NYSDEC SPDES General Permit (GP-99-01) for Concentrated Animal Feeding Operations (CAFOs). Based on the information provided by Mr. Hurst, the Department determined that he did not appear to be regulated by Article XIII.

8. On May 8, 2002, Mr. Brower visited the Hoover Farm to gather information on the operation and to review the impacts from Article XIII on the farm operation. Mr. Brower confirmed that Mr. Hoover was operating a hog farm and growing crops on the farm fields.
9. On June 13, 2002, Mr. Blot sent a letter to Supervisor Snow informing the Town that the Department had conducted a review of Article XIII of the Milo Town Zoning Ordinance for compliance with AML §305-a. Mr. Blot informed the Town that various provisions in Article XIII result in additional cost to Mr. Hoover's operation, exceed State standards and could adversely affect his ability to manage the farm operation effectively and efficiently. The apparently unreasonably restrictive provisions are essentially those contained in the Town's draft ordinance with respect to which the Department expressed its concerns in December 2001 (see paragraph 3 above). In addition, the Town requires that nutrient management plans be filed with the Town. Mr. Blot also stated that, based upon the Department's initial review, Article XIII appeared to unreasonably restrict farm operations, including the Hoover Farm, within Yates County Agricultural District Number 1, in possible violation of AML §305-a. The Town's views were requested on the issues raised, including whether it believes that the subject farm operation and farm practices present a threat to the public health or safety. Mr. Blot requested that the Town respond in writing within 30 days of receipt of his letter.
10. The Department did not receive a response to Mr. Blot's letter and by letter dated July 23, 2002, the Town was informed that the Department had completed its review of Article XIII of the Milo Town Zoning Ordinance regulating ILOs. The Town was further informed that the Department had concluded that Article XIII unreasonably restricts farm operations, including the Leroy Hoover Farm, within Yates County Agricultural District Number 1, in violation of AML §305-a, subd. 1. The ordinance prevents the effective and efficient management of farm wastes, adversely affects farm management, and exceeds the DEC CAFO permit requirements. The Department's conclusion that the Town has not demonstrated that the public health or safety is threatened by the animal waste management practices conducted on the Hoover Farm for agricultural production purposes within the agricultural district was also conveyed.
11. The Town was further advised by Mr. Blot of the Department's position that, to comply with AML §305-a, subd.1, the Town must not apply Article XIII of its zoning ordinance to farm operations within a county adopted, State certified agricultural district. The Department requested that the Town confirm within 15 days that Article XIII would not be applied to farm operations within a county adopted, State certified agricultural district. The Department did not receive a response to Mr. Blot's July 23, 2002 letter.

CONCLUSION

Based upon the above findings, I conclude the following:

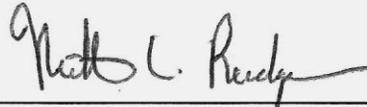
1. The Town of Milo's enactment of Article XIII of the Milo Town Zoning Ordinance regulating ILOs unreasonably restricts farm operations, including the Hoover farm operation, in Yates County Agricultural District Number 1 because of the manner in which it regulates animal waste management.
2. The Town has not demonstrated that the public health or safety is threatened by the animal waste management practices conducted on the Hoover Farm, or on farm operations generally, for agricultural production purposes within the agricultural district.
3. If the Town wishes to regulate the storage and land application of animal waste, a requirement that a DEC regulated and permitted activity also be subject to a locally administered permit would not be unreasonably restrictive if the local permit requirements did not exceed the State standard, and if applications are timely considered and issued without substantial fees or costs. A local law which required CAFO farms to submit copies of their permit applications and permits to the locality; make permit information available for inspection; and to keep the locality updated on changes in the permit status, would not be unreasonably restrictive. Also, to the extent permitted by State and federal law, a local law that adopted the State standard and included an enforcement mechanism would not be unreasonably restrictive.

DETERMINATION AND ORDER

Now, therefore, in consideration of the above-stated findings and conclusions, it is hereby determined that the Town of Milo has violated §305-a, subd. 1 of the AML, and it is hereby

ORDERED, pursuant to the provisions of §36 of the AML, that the Town of Milo comply with the provisions of AML §305-a, subd. 1 by not applying Article XIII of its zoning ordinance to farm operations, including the Hoover Farm, located within a State certified agricultural district.

This Order shall take effect immediately upon service of a certified copy thereof on the Town of Milo, by first class mail to Supervisor Norman Snow, at 140 Main Street Penn Yan, New York 14527.



Nathan L. Rudgers
Commissioner of
Agriculture and Markets

Dated and Sealed this 17th
day of September, 2002
at Colonie, New York